A

HUSAINI YAACOB

v.

TAN TEO SIANG

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
LINTON ALBERT JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: K-02-307-01-2012]

C

16 JUNE 2014

CONTRACT: *Loan agreement - Breach - Jual janji agreement - Transfer of ownership of land as security of agreement - Loan set to be settled within one year - Allegations that borrower tried to contact lender*

D

to settle debt and redeem land but to no avail - Whether efforts to show borrower trying to contact lender proved - Whether borrower willing and able to settle loan within agreed time frame to redeem land

DAMAGES: *Assessment - Appropriate basis of assessment - Transfer of ownership of land as security of agreement - Loan set to be settled within*

E

one year - Allegations that borrower tried to contact lender to settle debt and redeem land but to no avail - Whether efforts to show borrower trying to contact lender proved - Land sold to another person - Claim for full purchase price of land at market value minus loan sum - High Court awarded RM1.5 million to borrower - Whether judge correct in awarding

F

such sum - Appeal against decision made in High Court

By virtue of a *jual janji* agreement ('the agreement') entered into by the appellant and the respondent, the former agreed to lend RM60,000 ('the loan sum') to the latter. In return, the respondent

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was to transfer ownership of a piece of land ('the land') to the appellant. The time frame for the respondent to settle the loan was set to be one year from the date of the agreement, which was on or before 20 August 2008. Dispute allegedly arose when the respondent tried to settle the loan with the appellant. On

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15 July 2008, the respondent wrote to the appellant to express his intention to settle the loan sum and redeem the land but there was no response from the appellant. Through the respondent's friend ('PW3'), a copy of the respondent's letter was personally handed to the appellant on 8 August 2008. According to PW3,

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he met the appellant again on 16 August 2008 and 19 August 2008 and the appellant promised to re-transfer the land to the

respondent but still failed to do so. The respondent later discovered that the appellant had transferred the land to one Poh Chew Song on 16 October 2008 for the sum of RM600,000. This prompted the respondent to claim for the full purchase price of land at market value minus the loan sum. The appellant alleged that despite his attempts to contact the respondent, the respondent had failed to settle the loan sum and redeem the land before the expiry of the agreement. The High Court held in the respondent's favour and awarded him with the sum of RM1.5 million as damages. Hence, the present appeal. The issues that arose for the court's determination were: (i) whether the respondent was willing and able to settle the loan sum within the agreed time frame to redeem the land; and (ii) whether the judge was correct in awarding the sum of RM1.5 million to the respondent.

Held (allowing appeal)
Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) The respondent had failed to prove on a balance of probabilities that he was ready and willing to pay the loan to the appellant on or before 20 August 2008. During re-examination, he admitted that he could not make the repayment because he did not have the money. The trial judge had misdirected himself when he accepted the respondent's testimony that the letter dated 15 August 2008 was sent and received by the appellant when evidence showed that the said letter could not have been received by the appellant when it was posted on 17 August 2008, which was more than a month after the date that the said letter was written. (paras 9, 12 & 13)

(2) The High Court Judge had also erred in accepting the evidence of PW3 when he said that he had gone to the appellant's house, which was denied by the appellant, to inform the appellant that the respondent was ready to repay the loan together with interest. His Lordship also failed to appreciate the fact that since it was the respondent's land that was transferred to the appellant and since the respondent knew the appellant's telephone number, why did the respondent see the need to deal with the appellant through

A an intermediary, PW3, and thus giving rise to unnecessary questions of who said what, who did what and so on. (para 13)

(3) The High Court Judge had erred when His Lordship found B the valuer's report P5 to be in the agreed bundle of documents when it was actually found to be in the respondent's bundle of documents marked 'B'. The High Court Judge had also overlooked the fact that the report was marked P5 subject to its contents being disputed. Since the C maker of the report was not called to testify, the contents of the report remained disputed and inadmissible. His Lordship had misdirected himself when he accepted P5 as an exhibit of the court and had accordingly granted the award based on the report with a discount. (para 20)

D ***Bahasa Malaysia*** *Translation Of Headnotes*

Melalui satu perjanjian jual janji ('perjanjian tersebut') yang dimeterai oleh perayu dengan responden, perayu bersetuju untuk meminjamkan RM60,000 ('jumlah pinjaman') kepada responden. E Sebagai balasan, responden perlu memindah milik sebidang tanah ('tanah tersebut') kepada perayu. Tempoh masa untuk responden menyelesaikan pinjaman tersebut ditetapkan satu tahun dari tarikh perjanjian, iaitu pada atau sebelum 20 Ogos 2008. Pertikaian dikatakan timbul apabila responden cuba untuk menyelesaikan F jumlah pinjaman dengan perayu. Pada 15 Julai 2008, responden menulis kepada perayu, menyatakan hasratnya untuk menyelesaikan jumlah pinjaman dan menebus tanah tetapi tiada respon daripada perayu. Melalui rakan responden ('PW3'), sesalinan surat responden diserahkan secara peribadi kepada perayu pada 8 Ogos G 2008. Menurut PW3, dia bertemu dengan perayu semula pada 16 Ogos 2008 dan 19 Ogos 2008 dan perayu berjanji untuk memindah milik tanah tersebut semula kepada responden tetapi gagal berbuat sedemikian. Responden kemudiannya mendapat tahu bahawa perayu telah memindah milik tanah tersebut kepada H seorang yang bernama Poh Chew Song pada 16 Oktober 2008 bagi jumlah RM600,000. Ini menyebabkan responden menuntut harga jualan penuh pada nilai pasaran tanpa jumlah pinjaman. Perayu mendakwa bahawa walaupun dia berusaha untuk menghubungi responden, responden telah gagal untuk I menyelesaikan jumlah pinjaman dan menebus tanah tersebut sebelum perjanjian luput. Mahkamah Tinggi memutuskan berpihak

kepada responden dan mengawardkannya dengan jumlah RM1.5 juta sebagai ganti rugi. Oleh itu, rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah: (i) sama ada responden sanggup dan mampu membayar jumlah pinjaman dalam tempoh masa yang dipersetujui untuk menebus tanah tersebut; dan (ii) sama ada hakim bertindak wajar dalam mengawardkan jumlah RM1.5 juta kepada responden.

Diputuskan (membenarkan rayuan)
Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

(1) Responden gagal untuk membuktikan atas imbangan kebarangkalian bahawa dia bersedia dan sanggup membayar jumlah pinjaman kepada perayu pada atau sebelum 20 Ogos 2008. Semasa pemeriksaan semula, dia mengaku bahawa dia tidak dapat membuat pembayaran semula kerana tidak mempunyai wang. Hakim bicara telah tersalah arah semasa beliau menerima keterangan responden bahawa surat bertarikh 15 Ogos 2009 telah dihantar dan diterima oleh perayu sedangkan keterangan menunjukkan bahawa surat tersebut tidak mungkin boleh diterima oleh perayu kerana ia diposkan pada 17 Ogos 2008, iaitu lebih dari sebulan selepas tarikh surat tersebut ditulis.

(2) Hakim Mahkamah Tinggi terkhilaf dalam menerima keterangan PW3 apabila dia mengatakan bahawa dia telah ke rumah perayu, yang mana dinafikan oleh perayu, untuk memaklumkan kepada perayu bahawa responden bersedia untuk membayar semula pinjaman tersebut bersama-sama dengan faedah. Yang Arif juga gagal mempertimbangkan fakta bahawa oleh kerana tanah responden yang dipindah milik kepada perayu dan oleh kerana responden mengetahui bahawa nombor telefon perayu, kenapakah responden perlu berurusan dengan perayu melalui orang tengah, PW3 dan seterusnya membangkitkan soalan-soalan siapa yang mengatakan apa, siapa yang berbuat apa dan sebagainya.

(3) Hakim Mahkamah Tinggi terkhilaf apabila beliau memutuskan bahawa laporan penilai P5 berada dalam ikatan dokumen yang dipersetujui sedangkan ia dijumpai dalam ikatan dokumen responden bertanda 'B'. Hakim Mahkamah Tinggi juga terlepas pandang fakta bahawa laporan bertanda P5 tertakluk kepada kandungannya dipertikaikan. Oleh kerana pembuat laporan

A tersebut tidak dipanggil untuk memberi keterangan, kandungan laporan kekal dipertikaikan dan tidak boleh diterima. Yang Arif telah tersalah arah diri beliau apabila beliau menerima P5 sebagai ekshibit mahkamah dan memberikan award berdasarkan laporan dengan diskaun.

B **Case(s) referred to:**
Henry Trading Co Ltd v. Harun [1966] 1 LNS 65 FC ***(refd)***
Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corp [1986] 1 LNS 168 FC ***(refd)***

C **Legislation referred to:**
Evidence Act 1950, s. 114(g)

For the appellant - Simon Murali; M/s Lio & Partners
For the respondent - S Anthonysamy; M/s Aziz, Anthony & Co

D *[Appeal from High Court, Alor Setar; Civil Suit No: 22-288-2009]*

Reported by Najib Tamby

E **JUDGMENT**

Umi Kalthum Abdul Majid JCA:

[1] This is an appeal against the order of the High Court allowing the respondent's (the plaintiff in the court below) claim
F against the appellant (the defendant in the court below) for damages as a result of the appellant's breach of a "Jual Janji" agreement.

The Facts

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[2] The appellant entered into a "Jual Janji" agreement with the respondent on 21 August 2007 ("the agreement") whereby the appellant agreed to lend the sum of RM60,000 ("the loan sum") to the respondent. In return the respondent was to transfer
H ownership of a piece of land held under title Geran No. 16615, Surat Kechil No. 3520 (Bahagian Padang Lalang No. 380), Mukim Sungei Seluang, Daerah Kulim, Kedah ("the land") to the appellant. The contents of the letter containing the agreement (at p. 141, RR, vol. 2) is reproduced below.

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21.8.2007 A

Tan Teo Siang
(No. K/P: 440601-02-5043)
No 416-A Jalan Sungai Seluang
09600 Lunas
Kedah Darul Aman B

_____

Husaini bin Yaacob
No 1 , Persiaran Bertam Perdana 7/1
Penang Golf Resort
13200 Kepala Batas, Seberang Perai Utara, C
Pulau Pinang

Tuan,

PER: JUAL JANJI UNTUK PINJAMAN SEBANYAK RM60,000.00 D

Perkara diatas adalah dirujuk.

Saya dengan ini menyerahkan satu (1) salinan asal Surat hakmilik (geran) bagi hartanah yang terkandung dibawah Geran No. 16615, Surat Kechil No. 3520 (Bahagian Padang Lalang No. 380) Mukim Sungei Seluang, Daerah Kulim, Kedah Darul Aman dengan keluasan seluas 21 relong dan 424 jemba untuk dipegang oleh ENCIK HUSAINI BIN YAACOB (No K/P: 650221-02-5637) iaitu Pemberi Pinjaman terhadap Jual Janji ini. E

Surat hakmilik ini akan dipegang dan diproses urusan Pindahmilik tanah dan didaftarkan ke atas nama HUSAINI BIN YAACOB dari tarikh Surat Jual Janji ini ditandatangani. Surat hakmilik ini akan diserahkan semula kepada Penerima Pinjaman sebaik sahaja Penerima Pinjaman menjelaskan keseluruhan bayaran pinjaman tersebut termasuk segala tunggakan yang ada berkaitan dengan urusan Jual Janji ini. F G

Sekiranya saya sebagai Penerima Pinjaman telah menjelaskan kesemua bayaran termasuk tunggakan sebelum tamat tempoh yang dipersetujui maka saya HUSAINI BIN YAACOB dikehendaki memindah semula mengikut pemilik geran asal dengan SEGERA dan kos pindah milik ditanggung oleh Penerima Pinjaman. H

Saya sebagai Penerima Pinjaman dengan ini membenarkan Pemberi Pinjaman memasukkan kaveat keatas hartanah tersebut termasuk lain-lain transaksi untuk menjaga kepentingan Pemberi Pinjaman.

Sekian terima kasih. I

A Yang Benar,

...	...
TAN TEO SIANG	HUSAINI BIN YAACOB
(No. K/P: 440601-02-5043)	(No. K/P: 650221-02-5367)
B Penerima Pinjaman	Pemberi Pinjaman
TAMAT TEMPOH: 20/8/2008	

[3] The time frame for the respondent to settle the loan was set to be one year from the date of the agreement, that was, on or C before 20 August 2008. At trial, the existence of the terms of the agreement were not disputed by the appellant and the respondent.

[4] However, the respondent claimed that dispute arose when the respondent tried to settle the loan with the appellant. The D respondent had instructed his solicitor Messrs Haniff & Partners, to issue a letter dated 15 July 2008 (P2, p. 139, RR vol. 2) to the defendant expressing his intention to settle the loan sum and redeem the land. But there was no response from the appellant. The respondent had resorted to get his friend Abdul Halim bin E Osman ("PW3") to personally hand a copy of solicitor's letter to the appellant on 8 August 2008. According to PW3 he met the appellant again on 16 August 2008 and on 19 August 2008 and the appellant promised that he would retransfer the land to the respondent. However the appellant failed to do so. The F respondent later found out that the appellant had transferred the property to a person named Poh Chew Song on 16 October 2008 for the sum of RM600,000. The respondent filed his claim to recover the full purchase price at market value minus the loan sum from the appellant.

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[5] The appellant in his evidence, testified that the respondent had failed to settle the loan sum and redeem the land before the expiry of the agreement. The appellant did try to contact the respondent several times but failed each time to do so. The H appellant then exercised his right and sold the land to the Poh Chew Song on 6 November 2008 for the sum of RM600,000. However, the appellant received only RM300,000 from Poh Chew Song. Poh Chew Song had subsequently sold the land to Ng Giew Poh on 7 April 2009.

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Before The High Court

[6] At the conclusion of the trial, the learned trial judge found that the respondent had proven his case. The learned trial judge accepted the respondent's evidence that the respondent did try to pay the loan with interest to the appellant before the expiry of the agreement but that the appellant refused to accept payment from the respondent. The learned judge awarded the respondent the sum of RM1.5 million as damages. It was a discounted sum from the respondent's claim of RM2.2 million based on a valuation report (exh. P-5) of the land.

The Appeal

[7] In the appeal before us the learned counsel for the appellant raised two issues for our determination namely:

(i) Whether the respondent/plaintiff was willing and able to settle the loan sum he had taken from the appellant/defendant within the agreed time frame to redeem the land;

(ii) Whether the learned judge was correct in awarding the sum of RM1.5 million to the respondent.

Whether Respondent Was Willing And Able To Settle The Loan Sum

[8] It was the submission of the appellant that the learned trial judge had misdirected himself on the findings of fact and the applicable law when he accepted the evidence of the respondent that the respondent did try to contact the appellant but could not locate the appellant in order for the respondent to inform the appellant that the respondent was ready to repay the loan sum together with interest of 12% per annum. It was the appellant's submission that the respondent was not in the position to settle the loan sum within the time frame set in the agreement based on four points as follows:

(i) The respondent made no attempts to directly communicate with the appellant to express his intention to settle the loan sum and redeem the land. Through the evidence of PW3, the respondent knew the telephone number of the appellant. Yet, the respondent admitted that he made no attempts to contact the appellant when the time came for repayment of the loan and redemption of the land. It was submitted that if the

A respondent had the genuine intention to repay the loan and redeem the land, he could have just contacted the appellant. Thus it was submitted that it could be inferred that the respondent's failure to do so showed that he neither had the intention nor was in the position to repay the loan;

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(ii) The letter dated 15 July 2008, (marked as "exhibit P2") issued by Messrs Haniff & Partners for the respondent was never delivered to the appellant whether by post or personal service. According to PW1, a legal practitioner employed by the said
C firm of solicitors and who acted for the respondent at the material time, the said letter was sent out by way of AR registered post on the same day as dated therein. The date of postage would be indicated on the AR card. However, the date of postage on the AR card that was produced in court
D and marked as exh. P2B was 17 August 2008 (even though we noted that the "Akuan Menerima Surat Berdaftar Dalam Negeri" on the AR card was stated as 19 July 2008), that is, a lapse of more than a month between the date of the said letter and the date of its alleged posting. That being the case,
E the appellant submitted that there was no nexus between the AR card P2B and the said letter P2, and that the said letter was never actually delivered to the appellant. The appellant had also denied ever receiving the letter either by way of AR registered post or personal service. Hence, there was no
F notification by the respondent expressing an intention to repay the loan for the redemption of the land within the stipulated time;

(iii) The respondent did not have the financial means to settle the
G debt at the material time. It was submitted that the testimony of the respondent, together with the evidence of his two other witnesses PW1 and PW3, clearly established that the respondent did not have the financial resources to settle the debt by the due date. Through his own testimony, the
H respondent admitted that he was not able to repay the loan sum within the time frame. PW1, in re-examination, claimed that the repayment of the loan was to be undertaken by another person known as Sidek Petronas. The person known as Sidek Petronas only emerged during re-examination of PW1.
I There was no mention of such a person in the evidence of PW1 in examination-in-chief nor during cross-examination.

Neither did the respondent plead in his statement of claim on the existence of Sidek Petronas and the vital role he allegedly played in attempting to settle the respondent's debt. As the respondent was bound by his pleadings and as there was nothing in the evidence of the respondent to suggest that the repayment of the loan for the redemption of the land was to be undertaken by Sidek Petronas, it was the appellant's submission that it was obvious that the respondent did not have the financial means to settle the debt on or before 20 August 2008. Moreover, there was no evidence that Sidek Petronas provided financial assistance to the respondent for the settlement of the debt, no evidence on the true identity of Sidek Petronas and no evidence on the connection between Sidek Petronas and the agreement. The respondent therefore cannot demand for the return of the land as he failed to exercise his right to redeem it within the given time-period;

(iv) Sidek Petronas was not called as a witness of the respondent to corroborate the respondent's version that the repayment of the loan was to be undertaken by the former. As Sidek Petronas had allegedly played a significant role in the entire transaction, the failure on the part of the respondent to call Sidek Petronas as a witness, it was submitted, attracted the adverse presumption under s. 114(g) of the Evidence Act 1950 against the respondent in that, if Sidek Petronas had testified, his evidence would have been unfavourable to the respondent.

[9] Based on the four points raised by the appellant, it was submitted that the respondent had failed to prove on a balance of probabilities that he was in a position and had the capability to settle the loan sum on or before 20 August 2008. In the circumstances the appellant had acquired indefeasible title over the land and was entitled to deal with the land in the manner he wished.

[10] The learned counsel for the respondent in his submission submitted that at all material time, the respondent was in the position to pay the loan. The respondent maintained his ground that the letter dated 15 July 2008 was posted to the appellant. The same letter was also hand delivered to the appellant on 8 August 2008 by PW3. Therefore the issue whether the respondent was ready to pay the loan was never in issue. Furthermore Sidek Petronas was ready with the money to pay to the appellant.

[11] In the alternative, the learned counsel for the appellant submitted that even if the respondent was unable to pay the loan sum, the appellant had to sell the land and return the balance to the respondent.

[12] Having perused the pleadings, notes of evidence, witness statements and submissions of learned counsels before us, we found that the respondent had failed to prove on the balance of probabilities that he was ready and willing to pay the loan to the appellant on or before 20 August 2008. The respondent had admitted in re-examination that he could not make the repayment because he did not have the money - see p. 107, RR, vol. 2:

> S: Tadi kamu juga memberitahu kepada mahkamah, kenapa kamu sendiri tidak mahu bayar RM60 ribu tapi mahu tunggu orang lain bayar RM60 ribu itu?
>
> J: Saya tidak bayar RM60 ribu itu disebabkan masa perjanjian itu, tanah telah diberikan kepada Defendan dan saya tak ada wang untuk bayar.

The reference to Sidek Petronas's role in the repayment of the loan sum was never pleaded and therefore should not be taken into account to support the respondent's claim. And in any case, we agreed with the appellant's submission that the non-calling of Sidek Petronas by the respondent would attract the invocation of s. 114(g) of the Evidence Act 1950 against the respondent.

[13] We found that the learned trial judge had misdirected himself when he accepted the respondent's testimony that the letter dated 15 July 2008/P2 was sent and received by the appellant when evidence showed that the said letter could not have been received by the appellant when it was posted on 17 August 2008, that is, more than a month after the date of the letter was written. The learned judge had failed to appreciate this fact and went on to accept the evidence of PW3 when PW3 stated that he had gone to the appellant's house, which was denied by the appellant, to inform the appellant that the respondent was ready to repay the loan together with the interest. The learned judge had also failed to appreciate the fact that since it was the respondent's land that was transferred to the appellant, and since the respondent knew the appellant's telephone number, why did the respondent see the need to deal with the appellant through an intermediary, PW3, and thus giving rise to unnecessary questions of who said what,

who did what and so on. It was obvious to us that the learned judge, in accepting PW3's testimony did so without examining the issue whether the respondent was not only willing but also able to repay the loan. This to us amounted to a serious misdirection on His Lordship's part.

[14] As for the respondent's alternative submission that even if the respondent was unable to pay the loan sum, the appellant was required to sell the land and return the balance to the respondent, in the first place this aspect was not pleaded by the respondent in his statement of claim and it is trite law that the respondent was bound by his pleadings. Secondly, after studying the agreement, we found there was no provision/obligation which required the appellant to do so. The agreement was after all a "Jual Janji Agreement" and must be understood under its terms and conditions.

Award Sum Of RM1.5 Million

[15] Moving on to the second issue, the learned counsel for the appellant submitted that the learned trial judge was in error when His Lordship relied on the valuation report P5 as a basis to award RM1.5 million to the respondent. Without calling the property valuer as a witness who had prepared the report the authenticity and the contents of the valuation report remained doubtful. Therefore it should not be accepted as evidence. The learned trial judge in his reasoning stated that the valuation report could be accepted as evidence once it was placed in the agreed bundle of documents and the maker need not be called to testify based on the Federal Court case of *Henry Trading Co Ltd v. Harun* [1966] 1 LNS 65; [1966] 2 MLJ 281.

[16] It was submitted by the learned counsel for the appellant that in this case at the beginning of trial there was no classification of documents into "agreed bundle" and "common bundle". There were only three bundles of documents in this case, the plaintiff's bundle of documents marked as bundle B, the plaintiff's supplementary bundle of documents marked as bundle C, and the defendant's bundle of documents marked as bundle D (see p. 82, RR, vol. 2). Therefore the reason given by the learned trial judge was clearly erroneous and the case of *Henry Trading (supra)* was not applicable.

[17] Moreover, it was submitted that P5 was produced and marked as such subject to an important qualification, that was, the contents of the said document remained disputed and must be strictly proven. This position was clearly reflected in the notes of proceedings on pp. 91 and 97 of the appeal record vol. 2 where it was recorded as follows:

> Peguam plaintif: Yang Arif, there is one exhibit to be tendered.
>
> Peguam defendan: I understand that my learned friend is having difficulties in calling the maker. He can tender the document but subject to cross examination, contents to be disputed. (P5-Ikatan B, m/s 1-4).
>
> Peguam Defendan: Yang Arif, saya rujuk exhibit P5 iaitu laporan penilaian (valuation report), dalam Ikatan B m/s 1-4
>
> S: Saya katakan kepada saksi ini, laporan ini tidak boleh diterimapakai kerananya tidak mengatakan bagaimana penilaian RM2.2 juta dicapai. Kita sudah baca laporan ini dan dia tidak katakan apa kriteria atau faktor yang dirujuk untuk mencapai RM2.2juta.
>
> J: Tidak setuju.
>
> Peguam Defendan: Isu ini akan disubmitkan.
>
> Hakim: Kandungan P5 dipertikaikan.
>
> Peguam Defendan: Ya, kandungan P5 dipertikaikan.

The learned judge, it was submitted, had committed a fundamental error in failing to consider the express qualification made on the marking of the valuation report as exh. P5.

[18] It was submitted for the appellant that the disputed contents of the valuation report cannot be proven through the testimony of any witnesses other than the property valuer who professes the particular expertise. In this case, P5 was produced through PW2/the respondent, who made no comments with respect to its contents. Similarly PW3 did not make any comments on the contents of the report other than to state that he procured the valuation report from a third party and not directly from the firm of Smith Hodgkinson Ismail and Co. The third party is someone whom PW3 referred to as "Arkitek Zul". Consequently, it was submitted that the property valuer's report

P5 should remain as inadmissible because the contents remained unproven and therefore hearsay. The Federal Court case of *Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corp* [1986] 1 LNS 168; [1986] 2 MLJ 124 was referred to at p. 127 where Lee Hun Hoe CJ (as he then was) held that, at paras. D-E, left:

> Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier.

[19] It was further submitted that the learned judge also fell into error in awarding the sum of RM1.5 million, which was not what the respondent had prayed for. The learned judge made the said award because according to him "Sedikit diskaun wajar diberi bukan jumlah RM2.2 juta seratus peratus" without going further to elucidate why he thought a discount ought to be given in the first place.

[20] We had perused the appeal records and we agreed with the submissions of the learned counsel for the appellant. We found the learned judge had erred when he found the valuer's report P5 to be in the agreed bundle of documents when it was actually found to be in the respondent's bundle of documents marked "B". The learned judge had also overlooked the fact that the report was marked P5 subject to its contents being disputed. Since the maker of the report was not called to testify, the contents of the report remained disputed and inadmissible. The learned judge had clearly misdirected himself when he accepted P5 as an exhibit of the court and had accordingly granted the award based on the report with a discount. There again the learned judge had given the discount without explaining cogently why discount was necessary especially seeing that the sum awarded was not the sum prayed for by the respondent.

Conclusion

[21] For the reasons stated above, we found there were merits in the appeal and we were unanimous in allowing the appeal with costs of RM10,000. We set aside the decision of the High Court, and ordered the deposit be refunded to the appellant.